

## ***Program B***

### ***ADR and the Complex Case: A Conversation***

#### **Program Overview**

This program consists of a focused and directed conversation that inspires the participants to think creatively about how to use ADR in all phases of complex cases, from the pre-filing stage through appeal. At the outset a moderator and several individuals who will later serve as facilitators present either a hypothetical or an actual case that is representative of the most common type of complex cases filed in the district. Thereafter, the participants, in small groups, have conversations about creative approaches to using ADR in the case. The focused conversation design ensures that the program is not the typical “talking heads” panel presentation, on the one hand, or an open-ended, undirected conversation among facilitators and attendees with no clear purpose, on the other.

#### **Program Objectives**

1. To explore the issues and questions involved in selecting the appropriate and creative uses for ADR in complex cases
2. To learn the views of plaintiffs, defendants, court administrators, district judges, magistrate judges and bankruptcy judges on these questions
3. To have a purposeful conversation about creative ADR approaches and criteria to determine which ADR processes might be appropriate in complex cases that are typical in the district
4. To create a specific product – a list of creative ADR approaches and the criteria to determine which approaches are appropriate within the district, which can become a document provided to attorneys who file cases in the district or can be put on the court’s website

#### **Time for the Program**

<b>Activity</b>	<b>Time</b>
Introductory comments	10 minutes
Presentation of the case	20 minutes
Small group conversations	30 minutes
Small group reports	15 minutes
Concluding small group conversation	10 minutes
Concluding remarks	5 minutes
<b>Total time</b>	<b>90 minutes</b>

#### **Program Presenters**

1. **Moderator:** The moderator, selected from among the program organizers, should have familiarity with complex litigation in the district and with the district’s ADR program.

2. **Facilitators:** The facilitators should have experience with complex cases, either as court administrative staff, lawyers, judges, neutrals or court ADR staff. At least one should have experience with the type of complex case to be used in the program. In addition, they should

- Be engaging speakers
- Have flexible presentation styles
- Have excellent group participation skills
- Be respected within the district
- Have experience facilitating groups in a manner that encourages open participation.

If possible, all facilitators should participate in planning the program or, at a minimum, meet with the program organizers at least once prior to the program to be instructed about facilitating the conversations. A few of the facilitators will be used to present the complex case to the audience to begin the program; however, the main role of the facilitators is to participate in and guide the conversations at the small group tables.

**Room Set-up and Seating:** The moderator and facilitators who present the complex case should sit on a dais or stage in order to be visible to participants. The rest of the facilitators and the participants should sit at round tables that seat 6-8. There should be one facilitator per table. To work most effectively, table seating must be carefully organized to ensure a sufficiently diverse representation of lawyers (plaintiff and defense), judges and court administrative personnel to create interesting and engaging conversation. Ideally, a table of 6-8 should include a district judge, a magistrate judge and/or a bankruptcy judge, a defense lawyer, a plaintiff's lawyer and a member of the court staff. Tables can be organized by pre-assigning table seating and instructing participants where to sit as part of the registration or check-in process.

### **Instructions for the Program**

1. **Planning the Program:** This program requires the program organizers, who will likely also be the moderator and facilitators, to be familiar with the facts and law of the case on which they will focus and to have considered the opportunities for the use of ADR in the case.
  - a. **Distinguish this focused and directed conversation from other kinds of programs:** The success of this program depends upon the ability of the moderator and facilitators to structure the program as a true conversation among the facilitators and participants. The conversation has the following three distinguishing elements:
    - It is focused on program objectives.
    - It has a clear, intentional design to accomplish those objectives.
    - The facilitators perform dual roles of (i) leading the conversation by contributing to its content, rather than making formal presentations, and

(ii) facilitating the conversation process and structure while also participating in the conversation with one another and the audience.

- b. **Select the complex case to use in the program:** The focus of this program is a complex case that is typically litigated in the district where the program will be presented and with which the attorneys, mediators, court personnel and judicial officers who are selected to facilitate the conversation are familiar. Each district has its own litigation profile, and the types of complex cases that predominate in each district will vary. The following list describes various types of complex cases:

- Multi-party cases in which coordination of settlement discussions is complicated
- Multiple, related lawsuits, where coordinated settlement discussions may bring greater efficiency and consistency to the administration of justice
- Environmental cases, such as superfund litigation; siting of utility facility, highway, or other public works projects; toxic contamination; or multi-governmental agency regulatory matters
- Class actions, such as mass tort for personal injury, securities, product liability and employment discrimination or discrimination under the Americans with Disabilities Act
- Antitrust litigation
- Complex administrative regulatory matters involving rates or licenses
- Intellectual property cases
- Cases in which the parties may jointly have an interest in focusing resources on injunctive relief

In selecting the case, organizers might also consider using a recent, notorious complex case from the district.

- c. **Obtain relevant information about the chosen case:** Program organizers should learn all they can about the selected case, including the following:

- Investigating whether ADR was used in the case
- Hearing from individuals actually involved
- Reviewing public documents from the court file
- Researching news articles

- d. **Consider ADR approaches for all aspects of the case:** Organizers should also think carefully about how ADR was used or might have been used in the case and brainstorm how ADR might creatively be used in all phases of the litigation from pre-filing through appeal. In addition, the organizers should investigate creative ways ADR has been used in other complex cases in the district or in other districts in the Ninth Circuit by talking with ADR staff or judges. To assist in this brainstorming process, use the list of questions regarding the potential use of ADR, provided in the Facilitator's Guide at the end of this module. The purpose

of this brainstorming is to provide the table facilitators with possible uses of ADR in the case if examples are needed to encourage the conversations of the small groups.

- e. **Decide how to use the case in the program:** Organizers may decide to take the simple and straightforward approach of just presenting the facts, law and some uses of ADR in the case during the first part of the program. They may also consider the more engaging alternative of writing a role play focused on using ADR for one aspect of the case, such as using mediation to agree on a discovery plan or a plan to streamline the trial phase by narrowing the issues. To begin the program, some of the facilitators present the role play as a demonstration. Alternatively, the role play could be videotaped prior to the program, edited to ensure the essential points are made within the allotted time and shown to the participants.

Regardless of which approach is taken in presenting the case, the organizers should prepare a brief summary of the facts and law of the case to be handed out to the participants to help them understand the case so that they can more easily and effectively participate in the small group conversations.

## 2. Opening Presentation (10 minutes)

- a. **Moderator's opening comments:** The moderator introduces the program by
  - Welcoming the participants
  - Discussing the potential and the significance of ADR processes in complex cases – the particular value to parties of alternatives to litigation in complex cases
  - Describing the program's objectives (See the first page of this program module.)
  - Reviewing the agenda and describing the program generally
  - Outlining the organizers' process of choosing the sample complex case and the conversation facilitators
  - Inviting the conversation facilitators to introduce themselves
- b. **Facilitators' opening comments:** The facilitators will each introduce themselves with a brief description of
  - Their affiliation and practice/role
  - The types of complex cases they handle
  - Their experience with ADR processes in complex cases

**3. Complex case presentation, role play demonstration or role play videotape (20 minutes)**

- a. Purpose in presenting the case:** The purpose in presenting the complex case is to encourage audience participation and discussion of the issues and questions about the creative use of ADR to resolve complex cases within the district. Therefore, the more lively the introduction of the case, the more engaged the audience will be in the directed, focused conversation.
  - b. Complex case presentation:** The simple approach to describing the selected complex case is for three facilitators to give a detailed presentation of the facts and law of the case, focusing only on the details that are relevant to exploring the potential, creative uses of ADR. The first facilitator summarizes the relevant facts, and the second facilitator summarizes the relevant law. The third facilitator outlines the phases of the litigation, from pre-filing through appeal and, if ADR was used in the case, describes how it was used. The third facilitator can also give a few examples of the creative ways ADR has been used in other complex cases in the district or in other districts in the Ninth Circuit. If the case is hypothetical, one way to liven up this approach is to include some unorthodox uses of ADR, which would not likely be seriously considered but may encourage the discussion.
  - c. Presenting the complex case using a role play or videotape:** Rather than presenting the case in a discussion, the facilitators may choose to present the case through a role play of a scene from an ADR session in which they focus on some approach to using ADR in the selected case, such as using mediation to agree on a discovery plan or a plan to streamline the trial phase by narrowing the issues. If they use a role play, facilitators should shorten the initial presentation of the case to leave time for the role play.
- 4. Small Group Conversations (30 minutes):** Following the case presentation, the facilitators each sit at a table to facilitate the conversations about the selected case and ADR. There should be one facilitator per table. The facilitator asks for a volunteer to act as a scribe for the table, using an easel pad, if provided, or taking notes. The facilitators should use the Facilitator's Guide at the end of this program module to assist them in guiding the small group conversations.
- a. Brainstorming:** The facilitator opens the conversation for a lively brainstorming of possible ADR approaches, given the facts and law of the presented case. The facilitator encourages the participants to engage in conversation and to brainstorm freely without initially evaluating the ideas. The Facilitator's Guide includes questions designed to encourage brainstorming.

- b. **Evaluating the ideas:** The facilitator instructs the group to generate a list of criteria for the appropriate use of ADR in complex cases and evaluate the ideas suggested in the brainstorming session against the criteria.
  - c. **Accumulating suggestions:** Finally, the facilitator encourages the participants to decide on the specific ideas their group will present to the larger group for inclusion in a document to be provided to attorneys when they file a case in the district or put on the court's website. Each group should generate two lists of ideas: one focused on the criteria for selecting the appropriate use of ADR in complex cases in the district and a second list focused on potential creative uses of ADR.
5. **Small group reports (15 minutes):** The moderator leads the reports by calling on the scribes from each small group. Scribes stand at their tables and read the two lists they generated of (1) criteria for selecting ADR in complex cases and (2) ideas for creative uses of ADR. The moderator asks the scribes to hand in their lists at the conclusion of the program, so that the program organizers will have the option of transcribing the information for future use.
6. **Concluding small group conversations (10 minutes):** The moderator invites the participants at each table to engage in a concluding conversation about any additional ideas generated by what they heard from the other groups. Scribes should take notes on this conversation, as well.
7. **Concluding remarks (2 minutes):** The moderator should thank the organizers, facilitators, and participants, and conclude with a succinct statement of what he/she believes to have been the value of the program.

### **Written Materials**

1. Conversation Facilitator's Guide
2. Facts and law relevant to the complex case (to be developed by program organizers)

**Possible Follow-up:** To make the most of this program, the moderator could request that the scribes hand in their respective lists. A volunteer could assemble the lists and the suggestions from the facilitators and create a composite list of suggestions for distribution to district conference participants, and/or a volunteer could write a newsletter or local bar magazine article summarizing the suggestions. Either of these approaches would increase the likelihood that program participants retain and apply what they learn. The information could also be posted on the court's website.

## **Resources**

### **Publications**

1. ABA Section of Dispute Resolution Magazine, ADR in Complex Cases, Summer 1999. The entire issue is devoted to the topic. (This document is available at <http://www.abanet.org/dispute/magazine/home.html>.)
2. Cowell, Susan E., "Pretrial Mediation of Complex Scientific Cases: A Proposal to Reduce Jury and Judicial Confusion," 75 Chi.-Kent. L. Rev. 981 (2000).
3. Environmental Protection Agency, United States Environmental Protection Agency ADR Report, <http://www.epa.gov/adr/adrrept.pdf>.
4. Greenberg, Myron S. and Blazina, Megan A., "What Mediators Need to Know about Class Actions: A Basic Primer," 27 Hamline L. Rev. 191 (Spring 2004).
5. Lemley, Kevin M., "I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes," 37 Akron L. Rev. 28 (2004).
6. Posin, Daniel Q., "Mediating International Business Disputes," 9 Fordham J. Corp. & Fin. L. 449 (2004).

### **Videos**

**The following videos are available for purchase from the Center for Public Resources, <http://www.cpadr.org>.**

1. *Mediation in Action* video is available without CLE accreditation and involves a commercial contract dispute and demonstrates a complete mediation with counsel and client participation in 36 minutes with commentary on mediation phases.
2. *Out of Court – The Mini-trial* is a 30-minute videotape that demonstrates how a mini-trial is utilized to successfully resolve a dispute that resulted from a transnational shipping accident.
3. *Resolution through Mediation* is available without CLE accreditation and is a 28-minute videotape, produced by the International Trademark Association in cooperation with the CPR Institute, and depicts the resolution of a seemingly intractable trademark dispute between a Russian distillery and an American manufacturer and distributor of alcoholic products. A study guide accompanies the videotape.

## ***ADR and the Complex Case: A Conversation Conversation Facilitator's Guide***

1. **Focusing the conversation:** The success of this program depends upon the ability of the moderator and facilitators to structure the program as a true conversation among the facilitators and participants. This particular kind of conversation has three distinguishing elements:
  - It is focused on program objectives.
  - The program has a clear, intentional design to accomplish those objectives.
  - The facilitators perform dual roles of (i) leading the conversation by contributing to its content, rather than making formal presentations, and (ii) facilitating the conversation process and structure while also participating in the conversation with one another and the audience.
2. **Questions to encourage conversation regarding using ADR for all aspects of complex cases in the district:** Below is a list, organized by phases of litigation, to assist in the small group conversations to generate brainstorming of potential creative uses of ADR in complex cases in the district. Facilitators should focus on the questions that are most relevant to the case presented in the program.

### **Pre-filing**

- Are there reasons why exploring a pre-filing resolution might be worthwhile, such as desire for an expeditious, less costly or private resolution to the dispute?

### **Pre-discovery**

- Any pleading or scheduling issues that would lend themselves to ADR, for example, using ADR in lieu of a 12(b)(6) motion to identify the essential claims of the case?
- Any jurisdictional issues?

**As the parties consider an ADR process** (to determine whether ADR is advantageous and, if so, which process – mediation, a settlement conference, early neutral evaluation, non-binding or binding arbitration, summary jury trial, mini-trial or med-arb – would be most appropriate)

- Any issues involving the selection of ADR providers?
- What creative and unusual approaches to ADR might be appropriate, if you were to think “outside the box” about the potential of ADR in complex cases in the district?
- Any issues involving management of a group of related mediations or non-binding arbitrations?
- How could mediation be used to organize the case management process, including creating an ADR plan for the entire process of the litigation in this case?



- Are there cases involving environmental or other public policy issues that might be effectively resolved through a public policy consensus building facilitated process under court supervision?

### **Discovery**

- Is it appropriate to appoint a special master solely to oversee the discovery process using mediation?
- Could an early conference with the judge assigned to the case be used to create a discovery plan?
- How might magistrate judges be effectively used in the discovery process?
- Could a mediated process determine the procedures and guidelines for discovery and present an agreement to the court for review and approval?
- Could a mediated or arbitrated process be set up to resolve disagreements regarding the extent of discovery on particular issues in order to avoid the delay and case management issues arising from handling such matters through motions?

### **Expert and/or scientific evidence**

- Is it appropriate to appoint a special master to locate and evaluate the credentials of neutral experts to advise the court?
- Would a mediated process involving parties be more effective to identify an expert?
- Could an ADR provider set up a consensus-building process to supervise a group of scientists conducting experiments and tests in a case involving complex science?
- Could an arbitration panel composed of scientists and attorneys play an effective role in cases involving complex and uncertain science?
- If the case involves numerous scientific experts, could convening a mediation of the experts be used to facilitate understanding, communication, and to discover areas of agreement and areas where differing scientific approaches are being used and resulting in conflict?
- Might mediation be used to narrow the complex, scientific factual issues?

### **Motions**

- Could mediation be used to resolve motions?
- What impact might such a procedure have on the enforcement of court rules and precedent?

### **Trial**

- Could mediation be used to streamline *voir dire* and jury selection?
- Could mediation help the parties negotiate motions *in limine*, perhaps in a large case allowing them to negotiate an agreement, or trade, concerning numerous *in limine* motions?
- Could mediation be used to narrow or focus the issues to be tried to the jury or to the judge?
- Could mediation be used at the conclusion of various stages of the trial to assist parties to resolve all or some of the remaining issues?

### **Settlement approaches and implementation issues**

- Could an ADR provider administer the awarding of grants under a program set up to settle a complex case such as a toxic tort or tobacco litigation?
- In a complex case involving the over-payment of utility fees by millions of customers, could an ADR provider administer a study, funded by the utility, to determine means to improve services and/or increase public participation in rate-making decisions?
- In a case involving power or water utility re-licensing, could an ADR provider administer a process to study alternative sources of power or water?
- Does an ADR provider's administration of grants, studies, processes or any other post-settlement implementation process – or any other post-settlement implementation vehicle in return for a fee – give rise to a conflict of interest?

#### **Post-trial**

- Could mediation be used to resolve post-trial motions?
- What strategic considerations might the winner and loser at trial have about using ADR to resolve post-trial issues?

#### **Appeal**

- What kind of process would encourage parties to use mediation to resolve or reduce the issues to be heard on appeal?
- Are there special considerations in a complex case, as opposed to a simple case, that might motivate the parties to settle at the appeal stage, for example an interest in a prompt disposition of a complex business dispute involving a corporation whose executives are eager to resolve pending litigation that is an obstacle to pending or future business transactions?
- Why would the party who prevailed at trial (or on a pre-trial motion) want to negotiate a settlement? (They want a prompt disposition for personal or business reasons; the risk of losing the appeal is significant and the appellee's bargaining position is unlikely to improve in the future; an appellate decision in favor of the appellant will merely result in another trial, involving ever more expense and uncertainty.)

### **3. Are there complex cases that might be inappropriate for ADR or that might present special ethical problems?**

- Cases brought in the public interest?
- Cases brought by or against public agencies?
- Class action cases?
- Cases where the law needs further development?
- Cases that raise novel issues?
- Cases that impact constitutional rights affecting large numbers of people?

### **4. Questions to encourage conversation about the criteria to determine the appropriate use of ADR in complex cases in the district:**

- What ADR processes are appropriate for different complex cases and different stages in the litigation process?
- What purposes might ADR serve in complex cases?

- What characteristics make certain cases more appropriate for ADR at different stages?
- What are the timing issues regarding using ADR in complex cases?
- How does the degree of complexity of the case impact ADR issues?
- What characteristics of parties should be considered?
- What have been the typical approaches to ADR in the district?
- What are the underlying interests of the litigants, plaintiffs' attorneys, defense attorneys, administrative personnel and the judiciary in using ADR in a complex case during each phase of the litigation process?
- What are the strategic issues raised for plaintiff and defense attorneys with each use of ADR?
- What are the ethical issues raised for plaintiff and defense attorneys with each use of ADR?
- What communication issues between attorneys and clients and between attorneys are raised by the various ADR approaches in each phase of the litigation?
- What are the case management issues raised for attorneys and court personnel with each use of ADR?
- Are different ADR approaches appropriate depending upon the type of case?
- Who should determine when/how to use ADR?
- How should the various ADR approaches be selected and applied in specific cases?
- What ADR method(s) seem to work best for smaller cases in the district?
  - What are the principal barriers to using ADR in complex cases or in particular kinds of complex cases?
  - What are the potential downsides or risks of using ADR in complex cases or in particular kinds of complex cases?

**5. What are the potential uses of ADR in the complex case described at the beginning of the program?** (The list of issues related to the complex case at the center of the program will be unique to each case. Program organizers should generate a list of issues during program planning, as they consider ways ADR was used or could have been used in the case. See Instructions for the Program, above.)

## ***ADR and the Complex Case: A Conversation Feedback Form***

After you have reviewed this module or used it to plan and/or present a program, we would appreciate your feedback. Please fax (415-556-6179) or mail this completed form to Robin Donoghue, Asst. Circuit Executive – Legal Affairs, Office of the Circuit Executive, 95 Seventh Street, Suite 429, San Francisco, California 94103-1526. Please feel free to attach additional pages.

Name: \_\_\_\_\_

Tel. no.: \_\_\_\_\_ E-mail address: \_\_\_\_\_

Location of the program: \_\_\_\_\_

1. How did you use the module?
2. If you presented a program, was the program well received?      What factors likely account for its success or lack of success?
  - Presenters? Please explain.
  - Content? Please explain.
  - Format? Please explain.
3. How can we improve the module?
4. How can we improve the Program Guide?
5. What additional questions do you suggest we include in order to encourage conversation about creative uses of ADR in complex cases at various stages of litigation (or pre-filing)?
6. Please suggest topics for future ADR program modules.